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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CURT ORLANDO MARTIN, Defendant and Appellant.	C061672 (Super. Ct. No. 08F05391)

A jury convicted defendant Curt Orlando Martin of driving a stolen vehicle (Veh. Code, § 10851, subd. (a)), possessing stolen property (Pen. Code, § 496d, subd. (a)), being a felon in possession of a firearm (Pen. Code, § 12021(a)(1)), and resisting a peace officer (Pen. Code, § 148, subd. (a)(1)). The court found a prior conviction to be true and sentenced defendant to an aggregate prison term of six years four months.

On appeal, defendant contends the court erred in denying his motions for mistrial and new trial based on prosecutorial misconduct. We affirm the judgment.

FACTS AND PROCEEDINGS

Late one night, Sacramento County Sheriff Deputy Robert White saw defendant driving a 1991 maroon Toyota. There were three passengers in the car. When Deputy White typed the license plate number into his computer, he learned the vehicle was stolen.

Deputy White found the car about five minutes later parked on a nearby street. Defendant and three others were standing by the car. When Deputy White activated his overhead light bar, defendant began to walk away. Deputy White yelled at defendant to stop, but defendant ran and the officer chased him. Deputy White saw defendant's hand near his waistband but did not see anything in defendant's hands.

Defendant jumped over the fence of a home on Rodolfo Court, and was subsequently stopped by another officer, Deputy Formoli. The officer ordered defendant to show his hands and put them on his back but defendant did not comply. When it appeared that defendant was going to try to jump up, Deputy Formoli jumped on defendant's back. Defendant tried to get up and reached for his waistband several times. Deputy Formoli thought he was reaching for a weapon. Other deputies arrived and helped subdue defendant.

The following day, a young girl found a gun in the backyard of her great-grandmother's house on Rodolfo Court. The gun was loaded and bore no signs that it had been in the yard for any length of time. The homeowner had heard someone bang against

her fence and run through her yard the previous night, and she had called 911.

One of defendant's witnesses testified that she had been in the car with defendant, and that another person, a woman, had been the driver. The driver told them all to run because the car was stolen.

The jury convicted defendant of driving a stolen vehicle, receiving stolen property, being a felon in possession of a firearm, and resisting a peace officer. As described in great detail below, the trial court denied defendant's motions for a mistrial and a new trial, both of which were predicated on claims on prosecutorial misconduct.

This appeal followed.

DISCUSSION

I

Prosecutorial Misconduct/Mistrial

Defendant contends the trial court erred in denying his motion for mistrial and motion for new trial based on prosecutorial misconduct. He asserts the prosecutor twice brought out information about defendant's prior weapons conviction despite the court having ruled this evidence inadmissible.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it

infects the trial with such unfairness as to make the conviction a denial of due process.”’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “‘“the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”’” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The trial court denied the prosecutor’s motion to permit evidence of defendant’s prior conviction for assault with a deadly weapon under Evidence Code section 1101, subdivision (b). Defendant contends the prosecutor committed misconduct by twice eliciting information about the prior gun offense in contravention of the court’s ruling.

The first incident occurred when the prosecutor questioned Deputy White. The prosecutor asked the court if she could ask the officer about defendant’s parolee-at-large status, and the court agreed to this questioning. The following colloquy occurred:

“[DISTRICT ATTORNEY]: Deputy White, you had just answered question[s] related to the defendant’s warrants. Do you know what his parole status was at the time you contacted him on June 30th and July 1st?

“[DEPUTY WHITE]: During the course of the investigation that night I found out his parole status.

“[DISTRICT ATTORNEY]: Which was?

"[DEPUTY WHITE]: That he was a parolee at large. And that he was on parole for Penal Code Section 245(a)(2), H&S 11377 and H&S 11378, I believe.

"[DISTRICT ATTORNEY]: What is that?

"[DEPUTY WHITE]: One's possession of methamphetamine. Possession of methamphetamines for sale. And assault with a deadly weapon, specifically a firearm."

An unreported sidebar conversation ensued, but defense counsel did not voice an objection or request an admonition.

The second incident occurred during defense counsel's closing argument. Counsel argued that Deputy White "also found out later that my client was on parole for a meth case, which is consistent again, with [another witness's] statement of them getting high, going out to get high." The prosecutor interjected, "Objection, your Honor. I think that misstates the evidence. It wasn't for a meth case, it was for a gun." The court responded, "I'm not sure what it was for. Let's just stick with he was on parole." Again, defendant did not object or request an admonition.

"A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Defendant asserts that an objection and admonition would have been futile because the jury had already heard the comments and the court could not have erased this information from the

jurors' minds. But the same claim could be made whenever an attorney fails to object. Defendant's "ritual incantation" that the futility exception applies is insufficient to preserve his claims for appellate review. (See *People v. Panah* (2005) 35 Cal.4th 395, 462.)

Defendant also argues that the timing of his objection was immaterial because the prosecutor's misconduct compelled the granting of a mistrial and the trial therefore would have been stopped no matter when he made the objection. Defendant's argument assumes a mistrial was inevitable, a conclusion that lacks any support. The timing of an objection is indeed critical. There is nothing so inherently prejudicial in the fleeting comments made here that excuses counsel from objecting and seeking an admonition. Counsel has forfeited the issue on appeal.

Anticipating this conclusion, defendant contends that the failure to object constituted ineffective assistance of counsel. We do not agree.

To establish ineffective assistance of counsel, defendant must show that his counsel's representation fell below the standard of a competent advocate and a reasonable probability exists that, but for counsel's errors, the result would have been different. (*People v. Ledesma* (1987) 43 Cal.3d. 171, 216-218.) Defendant cannot meet either prong of this test.

In determining whether counsel's performance was deficient, we "assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that

counsel acted or failed to act." (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 216.)

Defense counsel's own assessment indicates that the failure to object in both situations was a conscious matter of trial tactics. In his motion for mistrial, made while the jury was deliberating, counsel explained, "I did not object at the time [to the prosecutor's speaking objection during closing argument] for the same reason that I did not make a big deal out of it when she elicited it from Deputy White on re-direct while he testified. I did not want to call the jury's attention to it since it was so highly prejudicial in this case (a gun previously vs. a gun charge in the current case)." He added that when the prosecutor had made her inquiry of Deputy White, "I did not ask for a mistrial at this point because for [*sic*] tactical reasons. Among other things, I felt the evidence in the case to that point favored my client. I noted at side bar that I did not wish to bring it up again in front of the jury so they would not place any undue weight on the information."

Counsel made similar representations in arguing his mistrial and new trial motions to the court.

Defendant's tactical calculations reflect a reasonable choice by a reasonable attorney. There was no ineffective assistance of counsel. (See *People v. Maury* (2003) 30 Cal.4th 342, 389.)

Moreover, defendant cannot establish that a different result would have been reasonably probable had objections and requests for admonition been made. A "reasonable probability"

is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) There is no such probability here. When trying to elude officers, defendant jumped a fence and ran through a backyard. The owner heard someone bang against the fence and run through the yard. The gun was found in the yard the next day. It is not reasonably probable that the jury would have deemed this mere coincidence and reached a different conclusion even if counsel had objected. Consequently, defendant cannot establish ineffective assistance of counsel.

II

Section 4019 Credits

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, (petition for review pending, petition filed April 19, 2010) we conclude that the amendments apply to all appeals pending as of January 25, 2010.

Even so, the recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, because, as the court found in bifurcated proceedings, defendant has a prior conviction for a serious or violent felony. (Pen.

Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.